

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1441

THE NATIONAL LAMPOON, INC.,

Plaintiff-Appellee,

-against-

AMERICAN BROADCASTING COMPANIES, INC.,
GEORGE SCHLATTER ENTERPRISES, INC., and
GEORGE SCHLATTER,

Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

Introduction

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Brieant, J.) entered April 8, 1974, after trial without a jury. The judgment, among other things:

- (1) decreed that plaintiff-appellee, The National Lampoon, Inc., is entitled to enforcement of its rights in the trademarks "National Lampoon" and "Lampoon"; and
- (2) permanently enjoined defendants-appellants, American Broadcasting Companies, Inc., George Schlatter Enterprises, Inc. and George Schlatter, from using the words

"National Lampoon" or "lampoon", alone or in combination with other symbols or words (such as "ABC" or "The ABC"), as the title for a television pilot program or series or other product in the communications or entertainment field; and

(3) permanently enjoined defendants from using any set spelling out the word "lampoon" with moveable or fixed letters in a television program or series or such other product.

The judgment was entered on the basis of findings of fact and conclusions of law contained in a memorandum opinion of the district court (titled "Findings and Conclusions") dated April 1, 1974. The opinion has not yet been reported.

ISSUES PRESENTED FOR REVIEW

Defendants have failed to make a statement of the issues presented for review.

In plaintiff's view, the basic issue is whether, on the entire record, the district court committed clear error, under the standard laid down by Rule 52(a) F.R.Civ.P., in its factual findings.

There are also issues as to whether the district court committed reversible error of law in concluding that:

1. Plaintiff is entitled to an injunction against defendants' use of the term "Lampoon" in connection with its television program under section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), proscribing false designations of origin and misdescriptions of products;

2. Plaintiff is entitled to such an injunction under the New York common law of unfair competition and section 368-d of the New York General Business Law, the anti-dilution statute;

3. Plaintiff is entitled to such an injunction, under 15 U.S.C. 1114, prohibiting infringement of trademarks.

A. The Nature of the Case and the Proceedings Below

Plaintiff is the publisher of the highly successful National Lampoon monthly magazine and the producer of phonograph records, a theatrical revue, a weekly radio program and closed-circuit television programs, all of which are also designated and marketed as National Lampoon products. Defendants George Schlatter ("Schlatter") and George Schlatter Enterprises ("Enterprises") produce television shows. American Broadcasting Companies ("ABC") broadcasts television programs.

In December of last year, plaintiff learned that defendants were planning to broadcast a comedy television program under the title "Lampoon", which was to serve as the prototype or pilot for a projected television series. The pilot was scheduled for broadcast in late March or early April, 1974.

Plaintiff promptly communicated with defendants, objected to their proposed use of the "Lampoon" title for their program, and urged that another title be selected. When defendants insisted that they would not abandon their intention to use the "Lampoon" name, plaintiff commenced this action by the filing of its complaint on February 7, 1974.

The complaint alleged that defendants' use of the word "Lampoon" for its program would constitute an infringement of plaintiff's trademark rights, under 15 U.S.C. 1114; would violate the proscriptions against false designation of origin and false description and representation in Section 43(a) of the

Lanham Act, 15 U.S.C. 1125(a); and would amount to unfair competition under New York State law and trademark dilution under Section 368-d of the New York General Business Law. Plaintiff asked for an injunction restraining defendants from using the word, alone or in combination with other words, as the title for the pilot program or for any later television series.

On the very day the action was commenced, plaintiff moved for a preliminary injunction. At the hearing of that motion, on February 21, 1974, the district court, pursuant to rule 65(a)(2) F.R.Civ.P., advanced and consolidated the trial of the action on the merits with the hearing on the motion. The trial took place on March 4-5 and 7-8, 1974. The trial transcript consists of 492 pages, and 47 exhibits were received in evidence. The issues were fully submitted to the court in post-trial memoranda filed on March 25, 1974.

On March 28, 1974, the district court announced its decision at a hearing in open court, and on April 1, 1974, the court handed down its memorandum opinion containing its findings and conclusions.

In brief, the district court found, inter alia, that the format and content of the program which defendants propose to produce under the "Lampoon" name is identical to and indistinguishable from that of plaintiff's publications and productions; that defendants' proposed use of the name was an attempt to pass-off their program as a product of plaintiff, thus exploiting plaintiff's name and reputation; that defendants' use of the name would inevitably create public confusion; and that irreparable injury to plaintiff would result. The

district court held that plaintiff was entitled to the permanent injunction it sought under the federal false designation of origin and false description provision, 15 U.S.C. 1125(a); under the New York common law of unfair competition and the New York anti-dilution provision, Section 368-d of the General Business Law; and under the federal trademark infringement provision, 15 U.S.C. 1114.

The order and judgment of permanent injunction was entered on April 8, 1974.

B. The Facts

Plaintiff does not accept defendants' statement of the facts as complete and accurate.

Since "it is a traditional commonplace that in this type of case the facts rather than precedents alone tend to guide the decision", Mortellito v. Nina of California, 335 F.Supp. 1288, 1294 (S.D.N.Y. 1972), we shall set forth the facts in some detail. In our statement, we shall cite to the district court's findings contained in its memorandum opinion as well as to the testimony and exhibits received on the trial. As will appear, the evidence fully supports the court's findings.^{1/}

^{1/} Certain facts were stipulated by the parties, and references designated "S _" are to paragraph numbers of the stipulation (marked Plaintiff's Exhibit 1). References designated "Tr. _" are to pages of the trial transcript. References designated "Ex. _" are to the number or letter marking the exhibits. References designated "Op. _" are to the district court's opinion of April 1, 1974.

1. Plaintiff's Activities and Trademark Use

The district court found that there was "[s]trong evidence" in the record that the "National Lampoon" mark and the word "lampoon" had acquired a secondary meaning denoting plaintiff's publications and its enterprises in theatre, radio and television (Op. 34, 39). Through "extensive and difficult efforts", plaintiff had built up a "consumer identification" of the mark with plaintiff's products and the "consistent 'product quality'" embodied in the format and content of all plaintiff's products (Op. 34, 41). The district court characterized this "product quality" as consisting of "humorous materials of various types, parodying and satirizing usually topical events. . . presented in no apparent order, with no narrative override or master of ceremonies to unify or explain a conglomeration of songs, monologues, skits, blackouts, and sketches" (Op. 28).

The record fully supports these findings.

a. Plaintiff's Enterprises

Plaintiff publishes National Lampoon, its monthly magazine and anthologies, special magazines and paperbacks; it produces a weekly radio program, a theatrical revue, phonograph recordings and closed-circuit television programs; and it manufactures such products as posters and polo shirts. Each of these is identified by the "National Lampoon" or "Lampoon" mark. Each of them is characterized by parody, satire or comedy. (Op. 11, 15; S 1; Tr. 12; Exs. 2-6, 31).

National Lampoon Magazine - The magazine published continuously since April 1970, contains humorous materials primarily in a satirical or parodying style, presented both in textual and visual form. In addition to regularly recurring columns or features, each issue devotes a substantial portion of its content to a single topical theme; for example, "Professional Sports" or "Racial or Religious Prejudice" (see S 6 for the themes covered in the January 1972 through March 1974 issues). The format of the magazine is a potpourri or a melange of text, cartoons, graphics, photos and the like, orchestrated to create surprise by rapid changes of pace. (Op. 3; Tr. 11, 21-23; Ex. 2, 31).

The magazine is distributed to 542 wholesalers throughout the United States and Canada; they in turn distribute it to about 70,000 newsstands and newsdealers; and about ten percent of the monthly circulation is by subscription. The average paid monthly circulation increased from approximately 167,000 copies per month in 1970 to over 700,000 copies per month in 1973; the circulation in early 1974 was over 900,000 copies; and present monthly sales are estimated at 1,000,000. Newsstand sales increased from 1970 to 1973 by 471%. National Lampoon is the nation's second fastest growing magazine. (Op. 9; Tr. 29, 39, 146, 148-49, 154-55; Ex. 7, 16).

The magazine enjoys a substantial national public acceptance and good will. A recent survey conducted by a

reputable independent market research company, Gilbert Youth Research (Division of Herff Jones Co.) disclosed that each copy of National Lampoon reached at least one person other than the purchaser and possibly as many as five other persons. Thus, assuming an average monthly circulation of about 700,000 for 1973, the magazine was seen by about a million and a half, and a possible three and one-half million persons. (Op. 10-11; Tr. 333-336, 338; Ex. 21, 22 (Tables L02B and L15))

National Lampoon Lemmings - The theatrical revue, National Lampoon Lemmings, produced and staged by plaintiff, opened in New York City in January, 1973, ran there until the end of November, 1973, and is now on national tour. About 100,000 people paid to see it in New York, and about 100,000 have seen it on tour. (Op. 11-12; S 10; Tr. 35-36).

The revue is a transposition to the stage of the type of parody, satire and humorous materials, primarily directed at contemporary life, which characterizes the magazine. It consists of a potpourri of skits, songs, blackouts, monologues, and other "bits" of varying lengths. New materials are regularly supplied in order to keep the topics current. Most of the magazine editors contribute materials for the revue; one of them is its chief writer, and another its director. (Op. 12-13, 15, and note 1; Tr. 33-36).

National Lampoon Radio Hour - Plaintiff's weekly radio program, The National Lampoon Radio Hour, was first broadcast in November, 1973, and has been on the air continuously since then. It is broadcast on Saturday or Sunday evening over approximately 156 radio stations, mostly FM but some AM, located in large metropolitan areas and small towns, in forty states, Washington, D.C. and Canada. (Op. 13, S 11; Tr. 42, 48; Ex. 6, 8).

Like the magazine, the radio program presents parody, satire and other humorous materials in a constantly changing melange of skits, monologues, songs, blackouts, improvisations and the like, dealing with contemporary topics. No emcee introduces the segments of unconnected materials. The program, like the theatrical revue, is directed by an editor of the magazine, and most of the magazine's editors have written or performed on it. (Op. 13, 15; Tr. 40-42).

National Lampoon Phonograph Albums - Plaintiff has also produced three phonograph record albums. The album entitled "National Lampoon Radio Dinner" has a format similar to the National Lampoon Radio Hour. That entitled the "National Lampoon Lemmings" consists of songs and other portions from the stage revue. The most recently issued album, "The Missing White House Tapes", parodies a television commercial offering a phonograph album for sale. All three recordings have achieved wide sale; the first two made the best

seller lists, and the Lemmings album was a nominee for the "Grammy" award (made by the National Academy of Recording Arts & Sciences) as best comedy album of 1973. (Op. 14-15; Tr. 361, 371-72; Ex. 5, 25, 29, 30).

The recordings consist of parody, satire and other humorous materials presented in the same potpourri approach as characterizes plaintiff's magazine, revue and radio show; and the material for the records again was furnished and performed by National Lampoon magazine editors. Plaintiff plans to produce at least three more albums this year. (Op. 14, Tr. 52-53).

National Lampoon Closed Circuit Television Programs -

In September, 1973, plaintiff contracted with Video Tape Network, Inc. for the production and distribution of several National Lampoon programs for closed-circuit television broadcast (Op. 15; Tr. 84; Ex. 14).

The topical and satirical materials and format of these programs, too, will be similar in format and content to the radio programs, "adapted...to television so that visual effects, such as animation and cartooning can be used" (Op. 15). The programs are to be written by editors of the magazine and to be performed by cast members from the stage revue and radio program. (Op. 15; Tr. 83-84, 87-88, 94-95).

Other National Lampoon Publications - In addition to the monthly National Lampoon, plaintiff publishes special editions of the magazine, containing new material or anthologies of material in past issues; and paperback books, again some of which are anthologies and some completely new matter (Op. 11; Ex. 3, 4).

National Lampoon Posters and Polo Shirts - Through independent contractors, plaintiff also manufactures and sells posters and polo shirts bearing the "National Lampoon" mark (Op. 11, S 14).

b. Advertising and Promotion of Plaintiff Products

The evidence amply supports the district court's finding that although plaintiff "has been in existence only since 1969, it has made extensive, successful efforts to bring its name into public consciousness" (Op. 34). Since 1970, it has engaged in extensive advertising and promotion campaigns. In 1973 alone, it spent more than \$500,000 in advertising. Its advertisements have appeared in nationally distributed magazines such as Time, Sports Illustrated, Psychology Today and Rolling Stone. National Lampoon staff members have made hundreds of appearances on television and radio talk shows, such as the Today and Johnny Carson national television programs; they are constantly lecturing and they are frequently interviewed by newspapers and trade journals. Plaintiff's radio program has not only been promoted over the radio stations which broadcast it; a television spot commercial for the program which plaintiff produced is now being

shown on more than 100 television stations. (Op. 13; S 15; Tr. 75-79, 218-20, 358; Ex. 9).

The National Lampoon publications and productions have also received extensive national press coverage and critical review in newspapers and magazines. Television stations, including the ABC, CBS and WNEW stations in New York, have televised parts of the theatrical revue and the radio show in production. (Op. 12; Tr. 55, 56, 58, 77, 79, 80-81, 211, 213, 356-358, 360, 362-65, 393-94; Ex. 9, 10).

c. Revenues of Plaintiff

Plaintiff's success is evidenced by the fact that in 1973 its gross revenues had reached the substantial figure of approximately \$6,800,000. In that year, net sales of advertising space in the monthly magazine alone were \$1,182,321; the net sales of advertising on the radio program are currently averaging about \$5,000 per week; and the gross revenues from sales of the three phonograph recordings have already reached the \$200,000 figure. (Op. 11, Tr. 33, 48-49, 108; Ex. 7).

d. Plaintiff's Trademark Use

Plaintiff registered the trademark "National Lampoon" in the United States Patent Office on February 2, 1971, under Registration No. 907,200. And as the district court found, since early 1970, when the first issue of its magazine was published, not only the monthly magazine, but each of its other publications, productions and products is identified by the "National Lampoon"

or "Lampoon" mark. Moreover, on "whatever product its name appears, the word 'Lampoon' is emphasized; it is shown in larger type below the word 'National'". (Op. 4, 11; S 16, 18; Exs. 2-5, 31).

In order to cement the public acceptance and identification of the marks with its product and to achieve a consistent and uniform product quality, plaintiff has regularly assigned members of its creative staff to work in the several areas of its endeavor. As the district court noted: "[a]ll of the editorial material for these many enterprises is created by the editorial staff of the National Lampoon magazine, and all productions are supervised by the same persons. Each activity may readily be seen as a natural outgrowth of the prior activities." (Op. 15; S 19; Tr. 35-36, 41-42, 53-54, 95).

Thus, the "National Lampoon" and "Lampoon" marks, when used "not only in magazines, but in radio, in television advertising and news events and closed-circuit television", have acquired a secondary significance associating with plaintiff as their common source ^{2/} (Op. 39).

^{2/} Correspondents write to plaintiff as "Lampoon" and refer to copies of the magazine as the "Lampoon" (Tr. 58-59; Ex. 11). Magazine wholesalers refer to the monthly magazine simply the "Lampoon" (Tr. 156). The communications and entertainment trade likewise refers to plaintiff enterprises as "Lampoon" enterprises (Tr. 53, 63-66, 118). Newspapers have also adopted the term in referring to plaintiff and its products (Ex. 9). (cont'd on next page)

2. Relationship Between Plaintiff and "Harvard Lampoon"

The concept of the National Lampoon magazine; as the district court found, originated with graduates of Harvard College who had worked together as staff members of the "Harvard Lampoon", a magazine of wit and humor founded in 1876, who "in effect took the Harvard Lampoon public" (Op. 4). From its very beginning, plaintiff has had a close and friendly relationship with the "Harvard Lampoon" editors, and the district court made detailed findings with respect to that relationship. These findings are fully supported by the record.

The "Harvard Lampoon" is published about eight times a year by Harvard College undergraduates. It is distributed primarily to Harvard undergraduates free of charge; some copies are also sold on newsstands in the Boston area and to subscribing alumni and libraries. It has a circulation of about 11,000, including about 3,000 subscribers. (Tr. 66-67, 69-70, 388-89)

The "Harvard Lampoon" has from time to time published

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- 2/ Plaintiff itself has also come to use the term "Lampoon" to signify the company and its enterprises. Plaintiff's staff members commonly use the term "Lampoon" (Tr. 73, 394). And the annual report issued by plaintiff's parent company, Twenty First Century Communications, Inc., refers to plaintiff and its enterprises solely by the term "Lampoon" (Ex. 13, pp. 1-5). The monthly magazine itself uses the term when it speaks of plaintiff and its staff (e.g., Ex. 2, December 1973, pp. 54-55; October 1973 issue, p. 4; September 1973 issue, p. 6; August 1973 issue, p. 10).

parody issues of established nationally circulated magazines. These resemble the magazines parodied, identifying the Harvard source by a small, usually ribboned, legend on the cover. The "Harvard Lampoon" and its parody issues are frequently referred to as "Lampoon" publications. (Op. 4, 8-9, Ex. 12, 33).

In the 1960's, the "Harvard Lampoon" editors sought advice from personnel at Twenty First Century Communications, Inc., plaintiff's parent, with respect to the publication of the Life and Time parody issues. It was from this early contact that the relationship between plaintiff and the "Harvard Lampoon" editors stemmed. In 1969, several "Harvard Lampoon" alumni suggested that Twenty First Century Communications, Inc. found a National Lampoon magazine, and three former "Harvard Lampoon" editors became the first editors of National Lampoon. (Op. 4, 8-9; Tr. 68-69, 207, 369-70, 389-90).

On October 8, 1969, plaintiff entered into an agreement with the trustees of the "Harvard Lampoon", providing that royalties were to be paid to the "Harvard Lampoon" publication on all sales of the National Lampoon magazine; that plaintiff would be permitted to use the term "Lampoon" as part of the title and trademark of its publications; and that the "Harvard Lampoon" editors would exercise controls over the character of materials and advertising in plaintiff's publications. The parties did not consider or discuss whether and to what extent the "Harvard

Lampoon" in fact had any trademark rights to the term "Lampoon". (Op. 4-5; Tr. 368-69; Ex. A, pars. (1)(a), (2)(a), (4)(d)).

The "Harvard Lampoon" editors have at all times been aware of plaintiff's use of the "National Lampoon" mark for its enterprises other than its publications; that is, its theatrical revue, its radio program, its phonograph recordings, its polo shirts and posters. They have never objected to such uses. And in a letter addressed to plaintiff, they have explicitly confirmed that they had been advised of the commencement of the present action and approved its prosecution by plaintiff. (Tr. 370; Ex. 33). As the district court found: "To the extent that Harvard Lampoon has a vested right in the mark ["Lampoon"] by prior usage, it has consented to and approved maintenance of this litigation by plaintiff to protect such rights, as well as plaintiff's rights" (Op. 8).

The district court found "that the steps taken by the parties to implement Harvard Lampoon's reserved rights and powers under the agreement [of October 8, 1969] were sufficient to assure that the quality of plaintiff's product would be satisfactory to Harvard Lampoon" (Op. 6). The court expressly refused to find (as defendants' urged) "that the 1969 agreement, as drafted or as administered, constitutes a naked license"; rather it concluded "that Harvard Lampoon has taken affirmative action to maintain quality and prevent dilution of the mark, and to the extent that it, and its predecessors had a common-law right in the name almost a century old, this right has not been lost" (Op. 7-8).

These findings are plainly supported by the record. Initially, plaintiff implemented the quality control provisions of the agreement by furnishing all editorial and advertising content in advance of printing to permit the Harvard editors to state their objections. That arrangement, however, proved too burdensome in light of the Harvard students' other commitments, and it was modified by mutual assent so as to provide that all issues of the magazine should be sent to the "Harvard Lampoon" editors for review immediately after printing, but five days prior to distribution. The modified arrangement has continued, and, as the district court observed, "the reserved supervision of quality standards by the Harvard Lampoon has not created a practical problem; only once was criticism of a particular issue proffered by Harvard, and that criticism was withdrawn after discussion". (Op. 6-7; Tr. 200-201, 391-93, 429-33).

3. Plaintiff's Entry Into Television and Discussions with ABC

The district court found: "It was natural to foresee expansion of plaintiff's activities to national television" (Op. 15). "Network television is within the plaintiff's area of natural expansion. . . ." (Op. 33). "It is natural for plaintiff, as it has planned for some time, to expand under its own name into the field of network television" (Op. 41).

Even before the agreement with Video Tape Network, Inc., in September 1973, for the production of the closed-circuit television programs (see supra, p. 11), plaintiff was

active in the television field. In May or June, 1973, ABC invited plaintiff to perform the second act of the National Lampoon Lemmings revue on its Friday night popular music show, "In Concert". Since prime time was not involved, plaintiff said that it would only do segments of the act, an agreement was made with ABC to that effect, and plans for filming were set. Last minute union problems, however, caused ABC to terminate the project. (Tr. 157-160).

Then, in July, 1973, Mr. Arnold Sank of William Morris Agency, the world's leading talent agency and plaintiff's representative, had discussions with Mr. Fred Rappaport of ABC (who had seen the National Lampoon Lemmings revue) about plaintiff's producing several television specials for ABC network broadcast. Rappaport was enthusiastic and arranged a meeting with Mr. Gary Pudney, ABC's Vice President - Variety Programs, on July 26, 1973, in ABC's New York offices. Mr. Matty Simmons, plaintiff's Board Chairman and chief executive officer; Mr. Tony Hendra, one of the National Lampoon editors; Mr. Sank; Mr. Pudney and Mr. Rappaport attended. Although Pudney wanted a promise of more shows, plaintiff made it clear that it would consider no more than four to six National Lampoon specials each year because the creative writing requirements for a weekly series would be so burdensome as to impair the quality of the program. When some concern was expressed about adapting the theatrical revue material to television, Simmons and Hendra

responded that the magazine and theatrical materials could easily be transformed into television material. As the meeting closed; Pudney expressed an interest in further exploring the matter, said that he would see the National Lampoon Lemmings revue as soon as possible, and asked for copies of the magazines which he might read. During the meeting, the proposed programs were always referred to as the "National Lampoon Specials". The ABC representatives expressed no reservation about conforming National Lampoon materials to the less tolerant standards of commercial television. Simmons and Sank left the meeting expecting that discussions would continue. Sets of the National Lampoon magazine were then delivered to Pudney for his review. (Op. 16-20; Tr. 97-98, 100-101, 110-115, 467, 474-76).^{3/}

There was a second meeting between plaintiff and the ABC people on November 20, 1973, also at ABC's New York offices. It was attended by Simmons; Mr. Henry Beard, the chief editor of the National Lampoon magazine; Mr. Leon Memoli, another William Morris Agency representative; and Mr. James Hay, ABC's Vice President and Director of Specials. Topics for the proposed

^{3/} As the district court noted, there was a dispute in the testimony as to what occurred at the July, 1973 meeting, Pudney's account varying considerably from Simmons' and Sank's (Op. 17,20). The court, however, found that the "overall impression created by Mr. Pudney's testimony was evasive and unconvincing; his memory poor" (Op. 21). It refused to credit his version.

National Lampoon specials were discussed. Hay, already acquainted with the magazine, was told about the National Lampoon radio program. Simmons made it clear that plaintiff was prepared to "tone-down" its materials to meet the more restricted commercial television standards just as it had done for radio. Hay expressed enthusiasm for the project and asked Simmons to detail for him a proposed special and to send him radio show tapes. (Op. 20-21; Tr. 101-102, 115, 136-39, 434-36, 438-41).

Shortly after, on November 28, 1973, Simmons sent a letter to Hay, confirming the discussions and stating that plaintiff was prepared "to start full scale development of a National Lampoon Special Comedy Hour" within the limitations imposed by commercial television. Simmons also sent Hay a tape of one of the National Lampoon Radio Hour programs. (Op. 21, 31; Tr. 102, 104-05, 437; Ex. 15).

At both ABC meetings, plaintiff's "Lampoon" mark was discussed as a significant ingredient in the success of plaintiff's television specials in that it would draw plaintiff's following into the television viewing audience. At neither meeting did the ABC representatives refer to ABC's then concurrent discussions with Enterprises and Schlatter. (Tr. 105-107, 139).

Also in November, 1973, plaintiff began working with an independent television producer, King-Hitzig Productions, on the development of a National Lampoon special. (Tr. 103).

4. Defendants' Television Program and Their Attempt to Pass It Off as Plaintiff's.

a. The Selection of the "Lampoon" Title for Defendants' Program.

The first written manifestation of defendants' adoption of the "Lampoon" name for its program appears in the presentation which Schlatter testified he delivered to ABC in late November or early December 1973 (Tr. 256; Ex. 17). As the district court found, however, the written document shows intrinsically that it could not have been created prior to the last week in November 1973, and probably was not given to ABC prior to December 5, 1973, the date it was registered with the Writer's Guild of America, West, Inc. (Op. 23). This was, of course, after the meeting between plaintiff and ABC in November 1973. The document itself bears a stamp showing that a copy was received by ABC on January 26, 1974 (Ex. 17). Although Schlatter testified that he fixed on the title some time in the Fall, either in September or October, 1973, the court found that Pudney received an earlier draft of the written presentation from Schlatter (which disappeared and was unavailable on the trial) in late October or early November 1973, and that it was then the series acquired the "Lampoon" title. (Op. 23; Tr. 231, 470).

b. Plaintiff's Notice to Defendants of its Claims to the "Lampoon" Mark

Plaintiff learned of the proposed broadcast of the Schlatter program by ABC in late November or early December 1973.

On December 12, 1973, its attorneys wrote Pudney that plaintiff had learned this, that it objected to the proposed use of the "Lampoon" title for defendants' program, that the use of that title would infringe on plaintiff's rights and that plaintiff would take all measures necessary to protect its rights in the term. A copy of that letter was sent to Schlatter in California. An exchange of correspondence then ensued among plaintiff's and defendants' attorneys, terminating in letters exchanged in late January 1974, in which plaintiff persisted in its position that defendants' use of the "Lampoon" title would infringe its marks and unfairly compete with plaintiff, and in which defendants asserted that they had the right to use the title and would do so. (Op. 25; Tr. 138-140; Ex. 20, 32).

The district court found that defendants were aware and had notice of plaintiff's claims and objections before they "had done any substantial work on the script [of their program] much less begun production" (Op. 25; see S 29; Tr. 303-304).

c. The Attempt to Pass Off Defendants' Program as Plaintiff's.

The district court found that there was a deliberate attempt by defendants to pass off their program as plaintiff's and thus to appropriate plaintiff's good will in the "Lampoon" mark. The court stated:

"The time sequence of the meetings between National Lampoon and ABC, and the subsequent creation and appearance of the Schlatter presentation with the title 'Lampoon' belies any suggestion of mere coincidence.

"The Court finds it impossible to believe that the selection of the title 'Lampoon' for ABC's program, out of a universe of possible titles, was fortuitous, in view of the negotiations between ABC and National Lampoon which began in July and continued until the end of November, 1973.

* * *

"ABC was under no obligation to sign a contract with National Lampoon, but it cannot exploit National Lampoon's name and reputation, or pass off its goods as those of plaintiff's. Upon the entire record, we conclude that defendants' use of the name or title 'Lampoon' is an attempt to do just that." (Op. 25-26, 27)

Although the district court said that it was expressing no opinion as to what part Schlatter played in this effort, it found that Pudney was responsible for the deliberate attempt to appropriate plaintiff's mark and good will (Op. 27).

The record unquestionably supports the district court's findings. According to Schlatter, he met with Pudney to discuss defendants' proposed program, then in its early conceptual stages, more than six and perhaps twelve times from July to December 1973 (Tr. 294). And, as already noted, the district court found that the title was in fact not chosen until late October or early November (see, supra, p.22). But, Pudney had already met in July with plaintiff's representatives to discuss its production of television specials under the "National Lampoon" mark (see, supra, pp.19-20). Thus, even according to defendants' testimony, the "Lampoon" name was not selected for their program until months after Pudney and plaintiff had already discussed the production of the "National Lampoon" specials and after Pudney and Schlatter had met repeatedly.

It is certainly reasonable, if not inescapable, to conclude from this that Pudney (and probably, through him, Schlatter) decided to call defendants' program "Lampoon" in order to gain the commercial benefits which would undoubtedly accrue from leading television viewers to associate defendants' projected television program of satire and humor with the well-known satirical and humorous publications and productions of plaintiff.

This conclusion is bolstered by the lame reason Schlatter assigned for selecting the "Lampoon" name "out of a universe of possible titles" (Op. 25). He chose that name, he testified, because "it not only was a title, but it was a description of what we were going to do. It said what the show was called and what it was about" (Tr. 249). But he did not consider that the title had any other special significance and conceded that defendants' program would stand or fall on factors other than the title: the date it was broadcast, the quality of the program, how well it did in ratings, how well it did in reviews, and whether it would find a place in the ABC network schedule for the coming year (Tr. 309-312).

d. The Close Similarity Between Defendants' Program and Plaintiff's Publications and Productions

The district court's conclusion that defendants deliberately attempted to pass off their program as plaintiff's finds further and strong support in the very close similarity of the format and content of defendants' program and that of plaintiff's publications and productions, and in the extraordinary emphasis given by defendants to the word "lampoon" not only as the title but as the pervasive "leitmotif" of their program.

The district court noted that the emphasis placed on "Lampoon" throughout defendants' program underscores their intention to exploit plaintiff's mark and good will (Op. 29). The program's "cold opening" will repeatedly focus on a set composed of six to ten-foot-high three-dimensional block letters spelling "LAMPOON" (Ex. C) and will be accompanied by "voice-overs" booming "Lampoon" repeatedly (Op. 28-29; Tr. 244, 274-279; Ex. E, pp. 1-6). The two "O's" in this gigantic "LAMPOON" set will function throughout the pilot program and the series as transitional devices (Op. 29; S-29; Tr. 244-245; Ex. 17, p. 24;^{4/} Ex. E, pp. 28-35. An additional smaller set of free-standing letters (Tr. 245) and large backdrops will also prominently spell out the word "Lampoon" (Ex. E, pp. 6-8, 14-16, 115, 192, 215).

^{4/} As the presentation (Ex. 17) is incompletely numbered, page numbers refer to pages counted from and including the cover.

The district court found that the "format and content of the program defendants propose to produce under the name 'Lampoon' is identical to and indistinguishable from that of plaintiff's work (Op. 27). As the detailed exposition in the court's opinion (Op. 27-29 and notes 1, 4) makes clear, it did so only after it had carefully and intensively examined and compared both the written presentation and script for defendants' program (Exs. 17, E) with plaintiff's magazine, other publications, records and some radio tapes (Op. 12-15); Exs. 2-6, 31). There can be no question that the record amply supports that finding.

Plaintiff's monthly magazine, other publications, phonograph record albums, weekly radio program and theatre review all present parody, satire, and other humorous materials, frequently of a topical nature, through various devices and techniques. The magazine's format is a constant change-of-pace mixture of cartoons, jokes, regular columns, photos, features and the like in an apparently unconnected order. That of the radio program, the theatre revue and the phonograph records is a melange of skits, blackouts, songs, monologues and the like, without connective narration or unifying emcee; this is particularly true, as the district court noted (Op. 29), of the radio program. The underlying philosophy of all these products is a balanced presentation; all points of view and all facets of a controversy

are satirized without favoritism or preference, and no point of view is made fun of repeatedly (see Ex. 9, N.Y. Times Magazine article, p. 2; Tr. 408-411).

The format and content of defendants' proposed program would be very much the same. Thus:

(1) The Schlatter presentation states that defendants' program would be based on the "equal time" premise -- satirize and parody everyone and everything equally without favoritism or special emphasis (Ex. 17, pp. 6-7, 14). Plaintiff's products too always strives to achieve balance by injecting levity into both sides of controversial issues (Tr. 408-411, 414-416).

(2) Defendants' program is characterized as a book of funny cartoons, jokes, and features transposed to television (Ex. 17, p. 7). This is an apt description of the National Lampoon magazine (Tr. 414).

(3) The "free form", fast-paced format for defendants' program would include graphics, animation, sketches, songs, and the like without connective narration or a unifying emcee (Ex. 17, pp. 9, 24-31). This format corresponds precisely to plaintiff's theatrical revue, particularly its first act; to the National Lampoon Radio Dinner record; and (to a lesser extent) to its magazine (Tr. 408, 412-414, 420-421).

(4) The focus of defendants' program, while some features and departments would recur, would be on unpredictability (Ex. 17, p. 26). So, too, while plaintiff's magazine has recurring features and departments, each issue is primarily devoted to unconnected materials (Tr. 421-423).

(5) Defendants' program would deal with "controversial subjects and provocative concepts (Ex. 17, p. 3) and materials described as "wild", "happy", "zany", "hip", "off-beat", "kookie", "outrageous", "bawdy", "biting", "impudent", "kinky", "irreverent", "uninhibited", "mischievous", "bizarre" (Ex. 17, p. 9), and "sometimes biting" (Ex. 17, p. 14). This description characterizes plaintiff's efforts as well; these adjectives are much the same as those used by the press in describing plaintiff's materials (Ex. 9).

(6) Almost all of the themes defendants plan to us (Ex. 17, pp. 9, 14, 27-30, 32; Ex. E), have already appeared in the National Lampoon magazine, and in some of plaintiff's radio shows. See Appendix attached to this brief.

In the words of the district court:

"In sum, a reading of Exhibit E [the script prepared by defendants for their program] shows that substantially the same kind of creative material is to be passed off, over network television under a substantially indistinguishable title or name as that used previously by plaintiff on radio or closed circuit television, as well as in other fields previously mentioned and closely allied to network television." (Op. 29-30)

5. The Irreparable Injury to Plaintiff

The district court found that even if one were to assume that:

"... defendants' program will be funnier, or better, or more acceptable in regard to its conformity with general public standards of taste, than a television series which plaintiff produced, nonetheless irreparable injury is present. The good will and product acceptance of plaintiff's existing radio program, closed circuit television, phonograph records, and even its magazines will be seriously impaired by the presence in the marketplace of a program under so similar a mark and so similar a format and audience appeal." (Op. 40-41)

The court so determined because, if defendants' program were broadcast, "public confusion as to the source of the program is inevitable" (Op. 34; see Tr. 175-184).

In particular, the court found that plaintiff's planned and natural expansion into television would almost certainly be foreclosed by the broadcast of defendants' program (Op. 41). It was the opinion of Messrs. Sank and Memoli, the representatives of the William Morris Agency, actively engaged in communications and entertainment, that the broadcast of defendants' program under the "Lampoon" title would materially and substantially impair plaintiff's chances of ever producing and selling a National Lampoon television program (Tr. 119-124), 140-42).^{5/}

In fact, as the court observed the "mere announcement to the trade of defendants' intentions appears to have chilled negotiations begun in November 1973 between plaintiff and . . . King Hitzig Productions, for the creation and production of television Specials" (Op. 30).

^{5/} This would be the case even were plaintiff's audience limited to college age population, for as both Sank and Mr. Hay testified, the youth market is that part of the consumer market most sought after by television advertisers (Tr. 133-351, 438-39).

ARGUMENT

This is essentially a fact case. In such a case, the appellants have the burden of overcoming the presumption that the district court's findings are correct and demonstrating that they are clearly erroneous, due regard being given to the district court's judgment as to credibility of witnesses (F.R.Civ. P. 52(a)), so that this Court "is left with the definite and firm conviction that a mistake has been committed." See United States v. United States Gypsum Co., 33 U.S. 364, 395 (1947). This burden is especially heavy where many crucial findings are based exclusively upon oral testimony and the trial judge has viewed the demeanor and assessed the credibility of witnesses. St. Louis Typographical Union No. 8 v. Herald Co., 402 F.2d 553 (8th Cir. 1968). See also United States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.); United States v. Jones Beach State Parkway Authority, 255 F.2d 329, 333 (2d Cir. 1958).

Defendants have utterly failed in their efforts to show that the district court's pivotal findings are clearly erroneous.

I

THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF WAS ENTITLED TO AN INJUNCTION AGAINST DEFENDANTS' USE OF THE TERM "LAMPOON" IN CONNECTION WITH THEIR TELEVISION PROGRAM UNDER 15 U.S.C. 1125(a)

The district court held that plaintiff was entitled to injunctive relief against defendants' use of the term "Lampoon" under section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). That section reads, in relevant part, as follows:

"(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce. . . shall be liable to a civil action. . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Defendants' brief does not even address itself to the section 43(a) holding although it furnishes the principal basis for the district court's decision.

Section 43(a) has "created a new federal cause of action for false representation as to the origin of goods", Apollo Distributing Company v. Apollo Imports Inc., 341 F.Supp. 455, 458 (S.D.N.Y. 1972); "a federal statutory tort of unfair competition sui generis", Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.) cert. denied 404 U.S. 1004 (1971). See also, Alum-A-Fold Shutter Corp. v. Folding

Shutter Corp., 441 F.2d 556 (5th Cir. 1971); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954); Geisel v. Poynter Products Inc., 283 F.Supp. 261, 266 (S.D.N.Y. 1968).

The broad reach of the statute and the availability of its remedies to any person likely to be injured by the conduct it proscribes are exemplified by recent decisions in this Circuit. Apollo Distributing Company v. Apollo Imports Inc., *supra*, (Weinfeld, J.); Mortellito v. Nina of California, Inc., 335 F.Supp. 1288 (1972, Gurfein, J.); D.M. & Antique Import Corp. v. Royal Saxe Corp., 311 F.Supp. 1261 (1970, Lasker, J.); see also, Sutton Cosmetics (P.R.) Inc. v. Lander Co., Inc., 455 F.2d 285 (2d Cir. 1972); Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F. 2d 538, 546 (1956, Clark, J., concurring); Gold Seal Company v. Weeks, 129 F. Supp. 928, 938-40 (D.D.C. 1955) *aff'd*. 230 F.2d 832 (D.C. Cir.) *cert. denied* 352 U.S. 829 (1956); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., *supra*; Mutation Mink Breeders Ass'n. v. Lou Nierenberg Corp., 23 F.R.D. 155 (S.D.N.Y. 1959); The Londontown Manufacturing Company v. Cable Raincoat Company, U.S.D.C., S.D.N.Y., 68 Civ. 2087, March 5, 1974.^{6/}

The Mortellito case, *supra*, summarizes the principles applicable under section 43(a), as follows:

" . . . it is not a prerequisite that the mark be registered. . . . A claim for relief arises if the defendant affixes to the goods a false designation of origin or any false description or representation. The defendant is subject 'to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation'. . . .

^{6/} This recent opinion has not yet been reported. For the convenience of the Court, we submit a copy of the opinion with this brief.

"The gist of the action under this section is a use of the mark or tradename in interstate commerce which is likely to cause confusion or to deceive purchasers as to the source of origin of the goods. . . . A false representation or description would be violative of §43(a) even though the plaintiff is not a direct competitor of the defendant. . . .

"Although, on its face, Section 43(a) seems to be for the benefit of the person who believes he is likely to be damaged, the emphasis has largely remained on confusion of the public. Confusion will necessarily be created if a mark or tradename. . . has acquired a secondary meaning, and if the defendant's mark or tradename exhibits a confusing similarity to it. . . . Yet, 'when the evidence does show or require the inference that another's name was adopted deliberately with a view to obtain some advantage from the good will, good name, and good trade which another has built up, then the inference of likelihood of confusion is readily drawn, for the very act of the adopter has indicated that he expects confusion and resultant profit. . . . As was said in *National Van Lines v. Dean*, supra, 237 F.2d at 692: 'if such an intent [to deceive] is shown, it raises a presumption that deception and confusion resulted.' Restatement of Torts § 729(b) is to the same effect." (335 F.Supp. at 1294-95)

In Gold Seal Company v. Weeks, supra, 129 F.Supp. at 940, Judge Youngdahl explicated the policy considerations which underlie the statute and the breadth of the relief it furnishes against unfair or unethical mislabelling and misdescription of one's goods and services:

". . . Section 43(a) does create a federal statutory tort, sui generis, and to this extent . . . [the plaintiff] need not show that any false description or representation was willful or intentional, need not prove actual diversion of trade (palming off, so to speak), need not establish a veritable monopoly position in the industry. It means that wrongful diversion of trade resulting from false description of one's products invades that interest which an honest competitor has in fair business dealings--an interest which the courts should and will protect whether it be called that of 'property', 'quasi-property' or something else. It represents, within this

area, an affirmative code of business ethics whose standards can be maintained by anyone who is or may be damaged by a violation of this segment of the code. In effect it says: you may not conduct your business in a way that unnecessarily or unfairly interferes with and injures that of another; you may not destroy the basis of genuine competition by destroying the buyer's opportunity to judge fairly between rival commodities by introducing such factors as falsely descriptive trade-marks which are capable of misinforming as to the true qualities of the competitive products."

See also, American Law Institute, Restatement of the Law, Second, Torts, Tentative Draft No. 8, § 712 and note to § 712 (pp. 27-30) (1963). (We shall hereafter cite this Draft simply as "Restatement, T.D. No. 8".)

It cannot seriously be questioned that the district court properly applied these principles and correctly determined that defendants' use of the term "Lampoon" in their proposed television program would violate Section 43(a).

The primary (if not the only) thrust of defendants' brief is that plaintiff has not acquired ownership rights in the term in the technical trademark sense. We shall respond to that argument in later sections of our brief. But such questions of technical trademark ownership are beside the point insofar as Section 43(a) is concerned. The word whose use is sought to be enjoined under that section need not be a registered mark, Mortellito v. Nina of California, Inc., supra, 335 F.Supp. at 1294; Apollo Distributing Company v. Appolo Imports Inc., supra, 341 F.Supp. at 458; and the plaintiff seeking relief need not be the owner of the word in

question; it is sufficient that he is likely to be damaged by its use. D.M. & Antique Import Corp. v. Royal Saxe Corp., supra, 311 F.Supp. at 1268.

Plaintiff obviously is likely to be damaged by defendants' use of the "Lampoon" term. If that word is used in connection with defendants' program and the program broadcast, as the district court properly concluded, plaintiff's expansion into network television, an area into which it is natural for plaintiff to expand and in which it is already actively attempting to move, would be effectively cut off (Op. 15, 33, 41).

Defendants quarrel with the district court's conclusion. They insist that the record indicates that plaintiff has no viable means of entering that area in the foreseeable future; that the quality of its materials is not suitable for television; and that the production of television programs is beyond its staff's capability (Defts'. Br., pp. 13-15).

But plaintiff has in fact already entered the television area. It is now producing several programs under the "National Lampoon" mark for closed-circuit television broadcast (Op. 15; Tr. 84; Ex. 14). A television spot commercial produced by plaintiff to promote its radio program is now being shown on more than 100 television stations (Op. 13; Tr. 78-79). And portions of the National Lampoon Lemmings stage revue and the radio show have been televised over the facilities of ABC, as well as other television stations (Op. 12; Tr. 77, 79, 360, 362-63).

There is certainly nothing in the record to suggest that plaintiff is unable to undertake the production of network television programs. The evidence rather is to the contrary. Before plaintiff learned of defendants' intention to use its mark for their program, it had participated in two conferences with ABC representatives at which the production of national television specials by plaintiff was actively considered, and it had begun to work with an independent television production company, King-Hitzig Productions, on the development of a National Lampoon television special (Op. 16-21, 31; Tr. 97-98, 100-106, 110-15, 136-38, 434-40, 474-76, 496).^{7/}

^{7/} Defendants infer plaintiff's incapacity to produce a national television show from the shortening of its radio hour to a one-half hour program, its failure to submit a written presentation to the ABC representatives, and the failure of the William Morris Agency representatives to inform plaintiff of defendants' intention to use the "Lampoon" name when they first learned of it (Defts'. Br., pp. 13-15). All this is nonsense. The radio hour was shortened so as not to overburden plaintiff's present staff, but there is no reason it cannot increase its staff to handle television. Plaintiff presented no written presentation to ABC because before it had a chance to do so it learned that ABC had become involved in the production of the Schlatter program under the "Lampoon" name. The William Morris Agency people did inform plaintiff of defendants' intention to use that name for their program as soon as they had learned of it, in late November or early December; contrary to defendants' statement, there is no evidence that the Agency people learned this any earlier.

Defendants also contend that the quality of plaintiff's materials is not suitable for television (Deft's.Br., p. 13). The short answer to this, as the district court pointed out, is that "there is nothing about. . . [plaintiff's] product which renders it more unsuitable or less adaptable for television than . . . [defendants'] product" (Op. 31). This is amply demonstrated by the description of some of the material in defendants' proposed program which is set forth in footnote 4 of the district court's opinion. Moreover, as the court noted, plaintiff has successfully adapted its materials to the standards of radio broadcasting; and there is no reason to believe that it could not as readily adapt its materials to television standards (Op. 13-14). And finally, less than a year ago, ABC itself invited plaintiff to perform a portion of its National Lampoon Lemmings revue on one of its television shows (Tr. 157-196).

It certainly ill behooves defendants to question plaintiff's capacity in the television field. ABC was actively and enthusiastically urging plaintiff to pursue the development of television specials for national broadcast over the ABC network as recently as November 1973 (Op. 20-21; Tr. 101-102, 106, 115, 136-38, 434-36, 438-40). Indeed, as late as November 28, 1973, plaintiff advised the ABC representative by letter that it was prepared to start full scale development of a National Lampoon special comedy hour (Ex. 15).

The district court was also quite correct in holding that the substantive requirements for section 43(a) relief had been met here; that is, such use of a word or symbol as "is likely to cause confusion, or to deceive purchasers into believing the source of origin of the goods of another" (Op. 32). This is the gist of a section 43(a) action. Geisel v. Poynter Products Inc., supra, 283 F.Supp. at 266-68; Mortellito v. Nina of California, supra, 335 F.Supp. at 1294.

As the district court found: "Public confusion as to the source of . . . [defendants'] program is inevitable" (Op. 34).

Actual confusion need not be shown; it is enough to establish likelihood of confusion. Apollo Distributing Company v. Apollo Imports Inc., supra, 341 F.Supp. at 458. The parties need not be direct competitors, particularly where the goods or services involved are the same or are closely related. Mortellito v. Nina of California, supra, 335 F.Supp. at 1294. And likelihood of confusion is inevitable if the mark has acquired a secondary meaning associating it with the plaintiff, and the defendant's mark is the same as or closely resembles it. Mortellito v. Nina of California, supra, 335 F.Supp. at 1294; Apollo Distributing Company v. Apollo Imports Inc., supra, 341 F.Supp. at 458.

It is, of course, no answer to say, as do defendants, that they operate in a different medium than plaintiff does (Deft's. Br., p. 44). First, as we have already noted, this is not true; plaintiff is in fact already engaged in the television area. But beyond this, television and radio broadcasting are so closely related that confusion in the two media is almost inevitable. Even where business activities of parties are but remotely related, the courts have found likelihood of confusion. See Vandeburgh, Trademark Law and Practice, §§ 5.41-5.43 (2d ed. 1962). So, in Hanson v. Triangle Publications, 163 F.2d 74 (8th Cir. 1947), the plaintiff publisher of the teenage magazine "Seventeen" was granted an injunction against the defendant dress manufacturer from labelling his product "Seventeen for the Junior Teens". In Conde Nast Publications v. Vogue School of Fashion Modelling, 105 F.Supp. 325 (S.D.N.Y. 1952), the court enjoined use of the trademark "Vogue" for a fashion modelling school, although the plaintiff had used the mark only for its fashion magazine, books and dress patterns, and never in connection with the operation of a modelling school. Similarly, in Esquire, Inc. v. Esquire Bar, 37 F.Supp. 875 (S.D. Fla. 1941), the publisher of the magazine "Esquire" was granted an injunction against the use of its "Esquire" mark for a bar and restaurant. And in Cue Publishing Co. v. Kirschenberg, 22 M.2d 188, 198 N.Y.S.2d 993 (Sup. Ct., N.Y.Co. 1960), the publisher of the entertainment and restaurant guide "Cue" was granted an injunction against the use of that term for a theatre ticket

brokerage. See also, Beef/Eater Restaurants, Inc. v. James Burrough Limited, 398 F.2d 637 (5th Cir. 1969) (gin manufacturer granted injunction against use of "Beef Eater" for restaurants); Sears, Roebuck and Co. v. Johnson, 219 F.2d 590 (3d Cir. 1955 (mail order distributor of automotive equipment, etc., granted injunction against use of "Allstate" for auto trailer leasing business)); North American Aircoach Systems, Inc. v. North American Aviation, Inc., 231 F.2d 205 (9th Cir. 1955) (manufacturer of aviation equipment granted injunction against use of "North American" for airline ticket agency); John Walker & Sons, Ltd. v. Bethea, 305 F.Supp. 1302 (D.S.C. 1969) (manufacturer of scotch granted injunction against use of "Johnny Walker" for motel); Tiffany & Co. v. Boston Club, Inc., 231 F.Supp. 836 (D.Mass. 1964) (retailer of silver, jewelry, china, glassware, granted injunction against use of "Tiffany" for restaurant); HMH Publishing Co. v. Playboy Records, 161 F.Supp. 540 (N.D. Ill. 1958) (publisher of magazine granted injunction against use of "Playboy" for phonograph records).

The right to protection against confusing and deceptive use of marks in related areas of endeavor was recognized almost half a century ago in Judge Learned Hand's classic pronouncement in Yale Electric Corporation v. Robertson, 26 F.2d 972, 974 (2d Cir. 1928):

" . . . it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he

vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."

The courts have especially been zealous in prohibiting exploitation of a mark in situations, such as we have here, where the offending use occurs in a field of activity into which the plaintiff's expansion would reasonably be anticipated. Thus, in Johnson Publishing Co., Inc. v. McLendon, 133 U.S.P.Q. 486, 487 (1962,, the Trademark Trial and Appeal Board sustained the opposition of the publishers of "Ebony" magazine to the registration of the word "Ebony" for a radio program, stating:

"Considering that publication of printed material such as magazines and radio broadcasting are closely related media for communicating information to the public generally and for advertising goods and services; there are many instances of common association, affiliation, or ownership of radio and television programs and newspapers and/or magazines; opposer's 'EBONY' magazine has been circulated in applicant's area of business for many years and has, in fact, been promoted and advertised over a particular radio station through which applicant's services are rendered; and both opposer's publication and applicant's broadcasting services are intended to reach the same segment of the public, it is considered to be more than likely that persons or advertisers familiar with the 'EBONY' publication will assume that 'EBONY' broadcasting services originate with, are sponsored by, or are in some way associated with opposer."

To the same effect are W.E. Bassett Company v. Revlon, Inc., 435 F.2d 656 (2d Cir. 1970) (manufacturer of manicuring implements granted injunction against use of mark similar to its mark for cuticle trimmer); American Biltrite Rubber Co. v. Barash Company, 390 F.2d 758 (C.C.P.A. 1968) (manufacturer of vinyl, primarily for luggage, successfully opposed registration of similar mark to its mark for vinyl shoe soles); L.S. Starrett Company v. Aaron Machinery Co., 160 F.Supp. 805 (E.D.N.Y. 1958) (manufacturer of hand tools granted injunction against use of its mark for machine tools); Telechron, Inc. v. Telicon Corp., 198 F.2d 903 (3d Cir. 1952) (manufacturer of clocks, clock radios and timers granted injunction against use of mark similar to its mark for radios and televisions).

The likelihood of confusion from both parties' use of "Lampoon" here is increased by the close similarity between the format and content of defendants' program and that of plaintiff's publications and productions. See Mortellito, supra, 335 F.Supp. at 1294; Apollo Distributing Company, supra, 341 F.Supp. at 458. Defendants see significant differences between the parties' products (Defts'. Br. 46-48). But this flies in the face of the district court's definitive finding that the products are very much alike:

"The format and content of the program defendants propose to produce under the name 'Lampoon' is identical to and indistinguishable from that of plaintiff's work." (Op. 27)

As we have already noted, the court did not come to this conclusion casually. The detailed recital in the opinion of the nature and character of plaintiff's products and defendants' program bespeaks a careful and critical examination and evaluation of the materials by the court (see, e.g., Op. 3, 11-15, 27-29 and notes 1, 4). And if one still has any lingering doubt that the products are alike, it will certainly not survive a look at the comparative tables in the Appendix attached to this brief, where it appears that almost all the themes defendants plan to cover in their projected television program series have already been dealt with in past issues of plaintiff's magazine and radio programs.

Likelihood of confusion stems, of course, from the secondary significance with which the term "Lampoon" has been clothed in the communications and entertainment fields. The district court correctly found that despite its relatively brief existence, plaintiff's extensive efforts "to bring its name into public consciousness" have proved successful (Op. 34), and that the terms "National Lampoon" and "Lampoon", when used "not only in magazines, but in radio, in television advertising and news events and closed-circuit television", have acquired

a secondary meaning denoting their origination with a common source, that is, plaintiff (Op. 39).

Defendants insist that the district court was wrong. They say first that the evidence does not support the court's finding. They then argue that a secondary meaning identifying the term with plaintiff and its products cannot be established because the word "Lampoon" is a common, dictionary word, generic as to plaintiff's products; because plaintiff has been in existence for only four years and some of its products for a shorter time; and because the word is sometimes used also to refer to the "Harvard Lampoon", the Harvard College undergraduate humor magazine (Defts'. Br., pp. 30-35).

We shall deal in a few moments with defendants' argument that plaintiff cannot acquire trademark rights in the term because it used it in a "generic" sense (see, infra, Point II). As we shall show the district court correctly found that that was not the way plaintiff is using it. In any event, the argument is one addressed to technical trademark ownership rights; and, as noted, section 43(a) relief does not depend on such rights.

That the word "lampoon" is a dictionary word does not, of course, preclude section 43(a) relief, as the prior decisions demonstrate. "Lampoon" is no more common a term than was the name "Nina" in Mortellito, supra; or the words "The Fog" in Londontown Manufacturing Company, supra.

The question is not "commonness", but rather whether the term has acquired a meaning associated with plaintiff or its products. See Restatement, T.D. No. 8, p. 11. The secondary meaning concept "contemplates...a word or phrase ordinarily, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market" which nevertheless over a period of time has become so identified with a particular producer or the particular products originating with that producer that it has come to mean his products. G & C Merriam Co. v. Saalfeld, 198 Fed. 369, 373 (5th Cir. 1912); see, generally, 3 Callmann, The Law of Unfair Competition, Trademarks and Monopolies (3d ed. 1969) 340-41, 368-81 (hereafter cited as "Callman"); see, e.g., Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F.Supp. 325 (S.D.N.Y. 1952); American Waltham Watch Co. v. United States Watch Co., 53 N.E. 141 (Mass. 1899) (landmark opinion by Justice Holmes).

Moreover, as the district court observed, the word is "somewhat unusual and not one used in the common language in this country"; and such attention as it had acquired is attributable to plaintiff's recent nationwide activities and recent activities of the "Harvard Lampoon" (Op. 38).^{8/}

^{8/} A study of word origins published in 1962 reported that the word "lampoon" was at that time "most often encountered as part of the name of the Harvard College undergraduate humor magazine". William and Mary Morris, Dictionary of Word and Phrase Origins, New York 1962, p. 210. This was eight years before plaintiff's National Lampoon monthly magazine was launched, in 1970. In view of the rapidly growing circulation of that magazine -- now about 1,000,000 copies per month -- there can be little question that the word is now "most often encountered" as a reference to the magazine and other products of plaintiff.

The fact that plaintiff has been publishing its monthly magazine only for four years and that its radio program and television activities are shorter-lived does not mean that the word "lampoon" could not have acquired a secondary significance identifying it with plaintiff and its products. Whether it has done so is a question of proof. And, contrary to defendants' assertion, there is ample evidence in the record to support the court's determination that the term has acquired such a secondary meaning. From the very moment plaintiff was organized and began to publish, it has engaged in extensive advertising and promotion campaigns, in newspapers and other publications, on television and on radio (Op. 12, 13; S 15; Tr. 55, 56, 58, 75-79, 80-81, 218-20, 358, 360, 362-65, 393-94; Ex. 9, 10). Its efforts have proved extraordinarily successful. The average paid circulation of the monthly magazine is now approximately 1,000,000 copies per month; newsstands sales have increased in the four years of publication by 471%; the publication is the nation's second fastest growing magazine; it is seen each month by at least a million and a half people and possibly three and one-half million people (Op. 9-11; Tr. 29, 39, 146, 148-149, 154-55, 333-36, 338; Ex. 7, 16, 21, 22). Two hundred thousand people have paid to see plaintiff's theatrical revue (Op. 11-12; S 10; Tr. 35-36). Its weekly radio hour, although on the air only since November 1973 is already being broadcast over 156 stations (Op. 13; S 11; Tr. 42, 48; Ex. 6, 8). The National Lampoon phonograph albums have all been best sellers (Tr. 361, 371-72).

It is not surprising therefore, as the record discloses, that in the communications and entertainment worlds, the terms "National Lampoon" and "Lampoon" are understood as denoting the common source of National Lampoon publications and productions (Tr. 53, 63-66, 118, 156; Ex. 9).

Of course, it is not necessary that the entire public should have come to identify the term "Lampoon" with plaintiff's products:

"Universality of recognition is not required. What is required is that a substantial section of the purchasing public should be proved to identify the trade name of the plaintiff's goods, and that this should be true of the district in which the defendant's trade is done." Folmer Graflex Corp. v. Graphic Photo Service, 44 F.Supp. 429, 434 (D. Mass. 1942); accord, 3 Callmann 362, and cases cited n. 63.

See also, Feathercombs, Inc. v. Solo Products Corporation, 306 F.2d 251, 255-56 (2d Cir. 1962); Restatement, T.D. No. 8, § 729, Comment a, p. 97.

Furthermore, the fact that plaintiff uses the two words "National Lampoon" as the title (or part of the title) of their products does not deprive it of the right to be protected with respect to the term "Lampoon" alone. Secondary meaning may arise not only with respect to a mark proper, but also with respect to a nickname or sobriquet:

"If the public calls for a product by other than its trade name, and the nickname is sufficiently distinctive, it may become a trade symbol entitled as

such to protection against unfair competition. Whether or not it is similar to the original trademark, the sobriquet is protected as an independent trademark if the owner formally adopts it as such or unprotestingly allows its continued use. It may be asked what minimum use the owner of the trademark must make of the popular nickname before he can protest its use by rivals. The obvious answer is none; the public use is a sufficient substitute for the trademark owner's use."

3 Callmann 352

So, in Atlantic Monthly Co. v. Frederick Ungar Publishing Co., 197 F.Supp. 524 (S.D.N.Y. 1961), the court, on behalf of the plaintiff publisher which owned the mark "Atlantic Monthly", enjoined use of the word "Atlantic" by another for a series of paperback books designated "Atlantic Paperbacks".

See also, Howard Johnson Company v. HO-JO Campsites, Inc., 273 F.Supp. 447 (M.D. Fla. 1967) (tradename "Howard Johnson's excludes the use of "HO-JO"); Metropolitan Opera Association, Inc. v. Metropolitan Artists, Inc., 27 Misc.2d 572, 212 N.Y.S. 2d 435 (Sup. Ct., N.Y. Co.) aff'd. 13 A.D. 2d 480, 214 N.Y.S. 2d 648 (1st Dept. 1961) (tradename "Metropolitan Opera Associates" excludes use of "Metropolitan" and "Met"); Warner Bros. Records, Inc. v. Warner Music, Inc., 167 F.Supp. 661 (S.D.N.Y. 1958) (trademark "Warner Bros" excludes use of "Warner").

As we have said, the proof here amply establishes that "Lampoon", as well as "National Lampoon", has developed a secondary meaning signifying products originating with plaintiff. Like "Atlantic" for "Atlantic Monthly", the term has become "the key or operative word" of "National Lampoon".

Certainly, it is the predominant word in the mark. As the district court found, on whatever product the name "National Lampoon" appears, "the word 'Lampoon' is emphasized; it is shown in larger type below the word 'National'" (Op. 11). A similar situation was involved in the Londontown Manufacturing Company case, decided only a few weeks ago by Judge Gurfein, with respect to the word "Fog" in the "London Fog" trademark. Although he concluded that there had been "inadequate proof for the explicit finding" that the abbreviation "The Fog" for the plaintiff's trademark, "London Fog", was entitled to protection as a technical trademark (Opinion, p. 8), he nevertheless enjoined the defendant from using the mark "Smog" for its products because of the likelihood of confusion with the word "Fog", which he found to be the dominant portion of the "London Fog" mark.

There is certainly no merit in defendants' argument that plaintiff must in any event be denied relief against their use of the "Lampoon" name, because the term has come to mean two sources of origin -- the Harvard undergraduates who publish the "Harvard Lampoon" and plaintiff. The short answer to the argument, at least so far as section 43(a) is concerned, is that it is a non-sequitur. That "Lampoon" may denote both Harvard and plaintiff does not mean that defendants' use of the term will not confuse the public. Perhaps some television viewers will be misled into attributing origin of defendants' program to Harvard rather than to plaintiff; but it is certain that they

will not credit it to defendants. The concurrent use of "Lampoon" by plaintiff and the "Harvard Lampoon" editors may dilute, but it certainly does not extinguish, the public's association of the term with plaintiff and its enterprises.

Defendants' argument seems to be based on the so-called "single source" rule. But that rule, as was made clear in Mutation Mink Breeders Ass'n., supra, 23 F.R.D. at 159-61 (S.D.N.Y. 1959), is not applicable in section 43(a) cases. The defendants there, seeking to avoid liability under section 43(a) for mislabelling their synthetic mink garments, insisted that even assuming a diversion of trade as a result of their conduct, none of the individuals in the plaintiff class could show that its trade, rather than that of another member, would be diverted. This, defendants contended, barred recovery. But the court refused to buy the argument.

Moreover, the Lanham Act explicitly permits concurrent registration of the same mark by two users, where that is not likely to cause confusion, 15 U.S.C.A. § 1052(d); and it makes no difference that the mark is descriptive. Callman, Unfair Competition, Trademarks and Monopolies, § 98.4(b), p. 666; see Avon Shoe Co. v. David Crystal, Inc., 279 F.2d 607 (2d Cir. 1960); Haviland & Co. v. Johann Haviland China Corporation, 269 F.Supp. 928 (S.D.N.Y. 1967); Avedis Zildjian Co. v. Fred Gretsch Mfg. Co.,

251 F.2d 530 (2d Cir. 1958); see also, Roman Products Corp. v. DiCrasto Dairy & Food Products, Inc., 361 F.2d 599 (2d Cir. 1966).

A party so entitled to concurrent use of a mark, just like one entitled to exclusive use, may prevent its subsequent wrongful use by a third party Aluminum Fabricating Co. of Pittsburgh v. Season-All Window Corp., 259 F.2d 314 (2d Cir. 1958).

One must also keep in mind that the "Harvard Lampoon" is not a nationally distributed magazine; it is published only about eight times a year, is distributed primarily to Harvard undergraduates free of charge, and has a circulation of only about 11,000 (Tr. 66-67, 69-70, 388-89). The parody issues do enjoy a wider leadership, but the Harvard origin of those issues is shown merely by a small legend on the cover (Ex. 12). It is improbable that magazine readers other than Harvard undergraduates and some few in the Boston area and from Ivy League colleges (hardly a substantial portion of the public) views "Lampoon" as meaning the "Harvard Lampoon". In any event, no one regards "Lampoon" as signifying defendants.

The likelihood that confusion will result if defendants use the term "Lampoon" in connection with their proposed television program is further established by the fact, as the district court found, that defendants selected that word as the title and the "leitmotif" of their program with the deliberate intent to pass it off as one of the National Lampoon (that is, plaintiff's) products (Op. 25, 26, 27). Defendants

fault the district court for emphasizing this aspect of the case (Defts'. Br., pp. 42-44). But it is a well-established rule that although passing off need not be shown for section 43(a) relief, proof of a deliberate intent to pass off almost conclusively establishes the likelihood of confusion (and in cases where pertinent, a secondary meaning for the word sought to be protected). Apollo Distributing Company, supra, 341 F.Supp. at 457-59; Mortellito, supra, 335 F.Supp. at 1294-95. Judge Gurfein summarizes the rule in Mortellito, as follows:

" . . . 'when the evidence does show or require the inference that another's name was adopted deliberately with a view to obtain some advantage from the good will, good name, and good trade which another has built up, then the inference of likelihood of confusion is readily drawn, for the very act of the adopter has indicated that he expects confusion and resultant profit. American Chicle Co. v. Topps Chewing Gum, 2 Cir., 208 F.2d 560, 562; Miles Shoes, Inc. v. R. H. Macy & Co., 2 Cir., 199 F.2d 602, 603; National Van Lines v. Dean, 9 Cir. 237 F.2d 688, 692.' Fleischmann Distilling Corp. v. Maier Brewing Co., supra, 314 F.2d at 158. As was said in National Van Lines v. Dean, supra, 237 F.2d at 692: 'if such an intent [to deceive] is shown, it raises a presumption that deception and confusion resulted.' Restatement of Torts § 729(b) is to the same effect." (at 1294-95)

Defendants' tortuous efforts to avoid the district court's determination that they adopted the "Lampoon" name so as to take a free ride on plaintiff's good will (Defts'. Br., p. 7, 43) are unavailing. The record clearly supports the court's findings. From July to December 1973, ABC's people were discussing with plaintiff's representatives the development and production of a

National Lampoon Special for broadcast over the ABC network. One of the ABC people, Pudney, was at the same time discussing with Schlatter the production of a comedy program by him. It was only after Pudney's meeting with plaintiff that the word "Lampoon" was selected for defendants' program (Tr. 97-98, 100-102, 106, 110-15, 136-38, 231, 294, 434-36, 438-40, 474-76, 496). It strains credulity to suggest that selection of that title was mere happenstance. The district court quite properly concluded that the "time sequence of the meetings between National Lampoon and ABC, and the subsequent creation and appearance of the Schlatter presentation with the title 'Lampoon' belies any suggestion of mere coincidence" (Op. 25). It was fully justified in refusing to believe that defendants' selection of the title "out of a universe of possible titles, was fortuitous" (Ibid.).

Defendants deliberate intention to take a free ride on plaintiff's good will is made manifest also by the way they propose to use the word "Lampoon". As the district court observed, they are not content to use it only as a title; they propose to build it into the very structure of the program (Op. 28-29).

II

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF WAS ENTITLED TO AN INJUNCTION AGAINST DEFENDANTS' USE OF THE TERM "LAMPOON" IN CONNECTION WITH ITS PROGRAM UNDER THE NEW YORK LAW OF UNFAIR COMPETITION AND SECTION 368-d OF THE NEW YORK GENERAL BUSINESS LAW.

The district court correctly held that plaintiff was also entitled to injunctive relief under the New York's common law of unfair competition and Section 368-d of the New York General Business Law.

As Judge Learned Hand stated in American-Marietta Company v. Krigsman, 275 F.2d 287, 289 (2d Cir. 1960):

"The whole basis of the law of 'unfair competition'. . . is that no one shall sell his goods in such a way as to make it appear that they come from some other source. The simplest form of this is to use the name or trademark of another, but the law goes further than that."

The recent decision in Londontown Manufacturing Company, supra, is informed by the same principles:

"The rule is quite clear in this circuit (although its application is sometimes difficult) 'that the second comer has a duty to so name and address his product as to avoid all likelihood of consumers confusing it with the product of the first comer.' Ritchie v. Chesebrough-Pond's Inc., 281 F.2d 755, 758 (2d Cir. 1960); A.T. Cross Co. v. V. Jonathan Bradley Pens, Inc., 420 F.2d 689 (2d Cir. 1972).

"If the defendant is selling its goods because of their value, it is in fair competition. If it wishes, in addition, to build up a mark connoting that it is the source of the goods, it should do so by a mark more clearly exclusive of itself. . . ." (Opinion, p. 15)

The New York law of unfair competition, as was pointed out in Mortellito, supra, 335 F.Supp. at 1295-96, is especially rigorous in proscribing use of marks confusingly similar to those earlier adopted by and associated with others:

" . . . In Santa's Workshop Inc. v. Sterling, 282 App.Div. 328, 329-330, 112 N.Y.S.2d 488, 489 (3d Dept. 1953), the Court said: 'The law of unfair competition no longer requires that plaintiff's business and advertising shall have acquired a "secondary meaning." . . . "The controlling question in all cases where the equity power of the courts is invoked is whether the acts are fair or unfair, according to principles recognized in equity". . . .'"^{9/}

The court further noted the significance of New York's anti-dilution statute (General Business Law § 368-d):

" . . . there has been and will be a dilution of the plaintiff's mark. It will be difficult for Nina to maintain a reputation for quality if there is a product with a similar name that is of poorer quality

^{9/} Defendants contend that the rule in Santa's Workshop Inc. was rejected in later decisions in the New York courts and in this Court (Defts'. Br., pp. 30-31). However, the two decisions which defendants cite -- Dell Publications Co. v. Stanley Publishing, Inc., 9 N.Y. 2d 126 (1961), and Speedry Products, Inc. v. Dri Mark Products, Inc., 271 F.2d 646 (2d Cir. 1959) -- make plain that the rule remains unimpaired in palming-off cases such as ours here. In such cases, as Speedry states, "secondary meaning is not a necessary factor" in establishing the right to an injunction against the deliberate misappropriation of a plaintiff's name or mark. 271 F.2d at 650.

and cheaper. And this detrimental effect will be heightened because, as Judge Motley aptly remarked in *Fund of Funds, Ltd. v. First American Funds of Funds, Inc.*, 274 F.Supp. 517, 526 (S.D.N.Y. 1967), 'defendant will be operating in an area of normal expansion for plaintiffs to which new area equity will extend its protection!'

"Dilution is an injury that differs materially from that arising out of the orthodox confusion. Even in the absence of confusion, the potency of a mark may be debilitated by another's use. This is the essence of dilution. Confusion leads to immediate injury, while dilution is an infection which, if allowed to spread, will inevitably destroy the advertising value of the mark. 3 R. Callmann, supra, at 955-57.

"Here we find what Judge Geller of the New York Supreme Court called a '"whittling down" [of] the identity and reputation of plaintiffs' names.' *Renofab Process Corp. v. Renotex Corp.*, 158 N.Y.S.2d 70, 77 (N.Y. Co. Sup. Ct. 1956). He held that, in New York: '[t]he likelihood of damage through "dilution" of its mark or symbol is enough.' (Id.) Therefore, the plaintiffs are certainly entitled to relief under the more lenient state standards, which focus more on notions of equity and dilution than does the Lanham Act." (335 F.Supp. at 1295-1296).

Applying these principles, New York courts have granted an injunction to the publisher of Cue Magazine, an established source of information on restaurants and entertainment in the New York area, against the use by the defendant of the name "Cue Theatre Tickets" for a ticket brokerage agency, Cue Publishing Co. v. Kirshenberg, 22 M.2d 188, 198 N.Y.S.2d 993 (Sup. Ct., N.Y.Co. 1960); to the publisher of "Modern Screen" magazine against the use of the title "Modern Movies" for another magazine similar in content and format, Dell Publishing Co. v. Ultem Publications, Inc., 171 Misc. 159, 12 N.Y.S.2d 55 (Sup. Ct., N.Y.Co. 1939); and to the manufacturer of the "Ronson" lighter against the use of the name "Gibson" for lighters which exactly copied features of the plaintiff's lighter, Ronson

Art Metal Works v. Gibson Lighter Mfg. Co., 205 Misc. 155, 127 N.Y.S.2d 786 (Sup. Ct., N.Y.Co. 1953).

In light of the circumstances in our case, there can be no question that defendants' use of "Lampoon" for their program would constitute unfair competition. "Lampoon" is the dominant part of the "National Lampoon" mark and has come to signify the products of plaintiff. Its use by defendants would undoubtedly mislead television viewers. Defendants' selection of the word deliberately in order to cash in on plaintiff's good will is proof of likelihood of confusion. The close similarity between defendants' program and plaintiff's publications and productions further enhances the probability of confusion.

III

THE DISTRICT COURT CORRECTLY HELD
THAT DEFENDANTS' USE OF THE TERM
"LAMPOON" WOULD INFRINGE PLAINTIFF'S
TRADEMARK RIGHTS

A. Plaintiff is the Owner of the "National Lampoon" and
"Lampoon" Marks

The district court held that defendants' use of the term "Lampoon" in connection with their program would not only violate Section 43(a) of the Lanham Act and constitute unfair competition; it would also infringe plaintiff's trademarks "National Lampoon" and "Lampoon".

Plaintiff has registered the "National Lampoon" mark in the United States Patent Office. "Lampoon", not registered, is a common law mark, entitled to the same protection as is a registered mark. See Turner v. HMH Publishing Company, 380 F.2d 224, 227 (5th Cir.), cert. denied 389 U.S. 1006 (1967); E.F. Prichard Co. v. Consumers Brewing Co., 136 F.2d 512, 518 (6th Cir. 1943), cert. denied, 321 U.S. 763 (1944); 4 Callmann 585.

The questions to be answered in seeking to determine whether plaintiff has trademark rights in "National Lampoon" and "Lampoon" entitled to protection are the same: Were the marks sufficiently distinctive ab initio to permit exclusive appropriation? If not, did they acquire secondary meaning and thus become distinctive? Were they adopted and used for plaintiff's products before defendants adopted and used them?

We have already addressed and answered these questions. Assuming arguendo that the marks were not distinctive ab initio, they have, in the four busy years of plaintiff's vigorous expansion of its various enterprises and exploitation of the marks, clearly acquired secondary meaning; and they now unquestionably signify the goods and services which come from plaintiff. They were adopted and used for plaintiff's publications and products before defendants announced their intention to use the "Lampoon" name for their program; indeed, defendants have never used the marks in commerce. Thus, defendants' use of those marks for their program would infringe plaintiff's rights in them.

B. Plaintiff's Mark "Lampoon" is not Generic

Defendants, however, insist -- indeed this is the principal argument in their brief -- that plaintiff can claim no trademark rights in the word "Lampoon" because it uses the word in its "generic or primary sense" (Defts'. Br., pp. 20-29).

Defendants' argument is unsound. As the district court held:

"The word "lampoon" does not, at least today, identify a type or classification of humor, nor does it identify a product such as a magazine, nor an ingredient of any product, as a generic term does. Rather, it describes humor, in the sense of sharp, biting wit, and such descriptive or suggestive word may achieve a secondary meaning; that is, products the source of which is plaintiff, or Harvard Lampoon." (Op.38-39)

The word serves an adjectival, not a denotative, function, and as such is a descriptive term, to which a secondary significance may and, in fact, has attached through extensive use in connection with plaintiff's publications and productions. There is nothing unusual about this. Descriptive terms commonly acquire secondary significance. In the Conde Nast case, supra, 105 F.Supp. at 331, where use of the "Vogue" name for a fashion modelling school was prohibited, this Court observed that

"'Vogue' connotes that which is in fashion at a particular time; it refers to the general trend or current mode of fashion. We find that the word 'Vogue' has acquired a secondary meaning so that the mention of 'Vogue' unaccompanied by further description brings to the mind of the public an immediate connotation of the plaintiff's publications. Though 'Vogue' is a word of everyday speech the plaintiff has, through constant usage, created in the public mind an association between its publications and the wearing apparel and accessories worn by the American woman of discriminating and fashionable tastes, which are there reported, pictured, sponsored or recommended. In the world of fashion, plaintiff has acquired a common law right to its exclusive use. The extent and boundaries of that use covers the range of ordinary associations that is formed in the public mind; it includes fashion modeling and schools where fashion modeling is taught."

And in W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656 (2d Cir.1970), this Court held that while the plaintiff's mark "Trim" described the function performed by its manicuring implements, it had acquired protectible secondary significance.

The cases on which defendants rely are plainly inapposite. In all but two, the words applied as trademarks for the products in question were the very words by which the classes of product were designated and in those two the words were held to be merely descriptive. In Application of Limestone Products Corp. of America, 312 F.2d 825 (C.C.P.A. 1963), "Calcite Crystals" was denied registration because it categorized the chief ingredient of the applicant's and others' products. In Cummins Engine Company v. Continental Motors Corp., 359 F.2d 892 (C.C. P.A.1966), "turbodiesel" was cancelled as a trademark because it defined the class of aircraft engines produced by the registrant and others. So, too, in Henry Heide, Incorporated v. George Ziegler Company, 354 F.2d 574 (7th Cir. 1965), "jujube" was found to be the class name of a type of candy made by the registrant and others. In Donald F. Duncan, Inc. v. Royal Tops Mfg. Co., 343 F.2d 655 (7th Cir. 1965), "Yo-Yo" was cancelled as a trademark because it was popularly used to designate a toy made by registrant and others. In Weiss Noodle Co. v. Golden Cracknel and Specialty Co., 290 F.2d 845 (C.C.P.A. 1961)

registration of a trademark meaning egg noodles in Hungarian was cancelled. In Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938), the name "shredded wheat" was found to identify a class of breakfast cereal products. In J. Kohnstam, Ltd. v. Louis Marx and Company, 280 F.2d 437 (C.C.P.A. 1960) the name "matchbox" was held to be strictly descriptive of the packaging for toy model vehicles and machines. Finally, in American Montessori Society v. Assn. Montessori, 155 U.S.P.Q. 591 (Trademark Trial and Appeal Board 1967), the opposer, a non-profit educational corporation which fostered the establishment of schools, teacher training programs, pedagogical equipment and materials pursuant to the educational philosophy of Maria Montessori, successfully contended that the name "Montessori" was descriptive of a certain educational technique and had not acquired a secondary meaning associated with the applicant. While the Trademark Trial and Appeal Board used the terms "generic" and "descriptive" interchangeably, its decision clearly was to the effect that "Montessori" was unregistrable because its primary significance remained descriptive and without secondary significance.

Here, plaintiff's mark "Lampoon", although it may at one time have borne a primarily descriptive significance, now predominantly means the goods and services whose common source is plaintiff.

C. The Agreement Between Plaintiff and The "Harvard Lampoon" Does Not Impair Plaintiff's Rights to its Marks

Defendants also argue that plaintiff's trademark rights in the "Lampoon" mark derive exclusively from a license from the "Harvard Lampoon" which contains no provisions for control of the quality of plaintiff's product and, as such, is an unlawful "naked license" conveying no rights (Defts'. Br. 8-19, 36-40).

There is considerable doubt, we believe, that the agreement entered into between plaintiff and the Harvard Lampoon trustees in October 1969 is a trademark license agreement. If so, it is a most peculiar license, for the licensor does not license its own mark for use by plaintiff but only part of it; a conventional trademark license would have granted rights to the use of the "Harvard Lampoon" mark, not to the word "Lampoon" as the agreement did. Moreover, the agreement suggests that the Harvard Lampoon itself was not certain that it in fact had any trademark rights to convey (see Ex.A, par. (1)(a)). In essence, the agreement was an acknowledgment in writing that the inspiration for plaintiff's magazine had come from former "Harvard Lampoon" editors, that plaintiff had some obligation -- moral, if not legal -- to the birthplace of the National Lampoon concept and that plaintiff therefore should foster the continuation

of the Harvard magazine by assuring it a royalty in whatever financial success the new venture might achieve. The parties did not even consider or discuss whether and to what extent the "Harvard Lampoon" had trademark rights in the term "Lampoon" (Tr. 368-69); they merely obviated any question of plaintiff's right to use the term by expressly providing that it would be permitted to use it in connection with the new magazine.

The permission granted by the agreement, moreover, was limited only to publications. Plaintiff, however, has made a much wider use of the term "Lampoon": in the theatre, on the radio, in phonograph records. As a consequence, "Lampoon" has acquired a secondary significance associated with all productions and publications of plaintiff. The "Harvard Lampoon" people have been aware at all times of this expansion of plaintiff's field of endeavor, but have never voiced any objection to plaintiff's use of the term for its many and varied enterprises. The February 19, 1974 letter from the "Harvard Lampoon", approving commencement and prosecution of this action by plaintiff, is a confirmation of Harvard's acquiescence in and approval of plaintiff's wide use of the mark (Ex. 33).

Even assuming that the October 1969 agreement were in any sense a trademark license, its terms in any event provide

for controls by the Harvard Lampoon over the content and quality of plaintiff's publications (Ex.A, par. (4)(d)). This contractual provision for control would be sufficient in itself, without exercise by the Harvard people, to overcome the objection that the "license" is a naked license, Pike v. Ruby Foo's Den, 232 F.2d 683 (D.C. Cir. 1956), Arthur Murray, Inc. v. Horst, 110 F. Supp. 678 (D. Mass. 1953); Ideal Toy Corp. v. Cameo Exclusive Products, Inc., 170 U.S.P.Q. 596 (TM.T & App. Bd. 1971). And, in fact, the "Harvard Lampoon" editors have exercised such controls (Tr.200-201, 391-93, 429-33; see, supra, p.18).

This, in substance is what the district court held:

"I find that the steps taken by the parties to implement Harvard Lampoon's reserved rights and powers under the agreement were sufficient to assure that the quality of plaintiff's product would be satisfactory to Harvard Lampoon.

* * *

"I do not find that the 1969 agreement, as drafted or as administered, constitutes a naked license, and conclude that Harvard Lampoon has taken affirmative action to maintain quality and prevent dilution of the mark, and to the extent that it, and its predecessors had a common-law right in the name almost a century old, this right has not been lost." (Op. 6-8)

Defendants' contention that plaintiff has lost whatever trademark rights it may have had in the word "Lampoon" by reason of the October 8, 1969 agreement with the "Harvard Lampoon" is completely without merit.

D. Plaintiff Did Not Lose Its Trademark Rights Because of Misrepresentations In Its Application for Registration of the "National Lampoon" Mark in the Patent Office

Defendants also argue that plaintiff cannot claim trademark rights in "Lampoon" because it made material misrepresentations in its application for registration of the trademark "National Lampoon" (Defts'. Br., pp. 40-41).

The district court found no merit in defendants' claim of fraud and held that even "if the registration were voidable for fraud, the common law rights of plaintiff would not be lost" (Op. 40).

The district court's ruling is clearly correct. First defendants say that plaintiff misrepresented itself as the owner of the "National Lampoon" mark in applying for registration. But the agreement with the "Harvard Lampoon" of which defendants make so much acknowledges plaintiff's right to use "National Lampoon" as its trademark (see Ex. A, par. (1)(a)(i)). Thus, it recognized plaintiff as the owner of the "National Lampoon" mark when it registered it, and it committed no impropriety in representing itself as such.

Second, the failure to refer to the alleged "Harvard Lampoon" mark in plaintiff's registration application was not a material misrepresentation. The statute involved, 15 U.S.C. 1051(a)(1), requires only a statement that no one else

". . . to the best of his [the applicant's] knowledge and belief, has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods of such other persons to cause confusion, or to cause mistake, or to deceive. . . ."

Plaintiff applied to register "National Lampoon", not "Harvard Lampoon". At the time it did so, in 1970, there was no reason to believe that the resemblance between the two names was likely to cause confusion, mistake or deception. (Indeed there is still no reason to believe so; the "Harvard Lampoon" is a magazine of very restricted circulation.) There is certainly no evidence to warrant a finding of fraudulent intent on plaintiff's part. The case cited by defendants, Bart Schwartz International Textiles, Ltd. v. F.T.C., 289 F.2d 665 (C.C.P.A. 1961), presents a quite different situation.

IV

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS' USE OF THE TERM "LAMPOON" FOR ITS PROGRAM WOULD GRAVELY AND IRREPARABLY INJURE PLAINTIFF. PLAINTIFF HAS NO ADE-
QUATE REMEDY IN LAW.

The district court was correct in holding that money damages would be inadequate here and that plaintiff would suffer irreparable injury if defendants were not restrained from using the "Lampoon" term in connection with their television program (Op. 40-42). As the Court said:

".... The good will and product acceptance of plaintiff's existing radio program, closed circuit television, phonograph records, and even its magazines will be seriously impaired by the presence in the marketplace of a program under so similar a mark and so similar a format and audience appeal.

* * *

". . . It is natural for plaintiff, as it has planned for some time, to expand under its own name into the field of network television. That this will be difficult or impossible if defendants persist in television their product under the name "Lampoon" or "ABC Lampoon", is obvious...." (Op. 41)

By contrast, all that defendants stand to lose is an as yet untested title for their show, which Schlatter conceded is not a primary ingredient for its success (Tr. 309-12).

None of the injuries plaintiff would suffer can be measured in money. In fact, the consequences which normally flow from trademark infringement and from unfair competition are inherently unremediable in money. Omega Importing Corp. v. Petri-Kine Camera Company, 451 F.2d 1190, 1195 (2d Cir. 1971).

THE JUDGMENT BELOW IS NOT
OVER-BROAD

Finally, defendants contend that the judgment of the district court is over-broad and must "be drastically altered" (Defts'. Br., p. 50). They do not suggest an alternate form of judgment.

Whatever might be appropriate in other cases, there can be no serious question, we believe, that the judgment here is in all respects proper in light of the record in this case. We are not concerned with a defendant who has happened to use another's trademark innocently and in good faith. Defendants in this action deliberately set about to appropriate plaintiff's mark in order to exploit the valuable nationwide consumer acceptance and good will for "Lampoon" products which plaintiff had painstakingly developed. Their conduct is far from innocent.

Defendants suggest that plaintiff would be adequately protected if they were permitted to use the "Lampoon" term with a disclaimer. In light of the record here, their suggestion is unbelievably disingenuous. The disclaimer defendants offered to incorporate in their program (and which their brief suggests has already been included in the filming) is so ludicrously presented and so submerged in a welter of other purported, but fictional, disclaimed connections, that no television viewer would take it seriously. We respectfully urge the Court to

examine this so-called "disclaimer" in defendants' script (Ex. E, pp.11-12).

In any event, as has often been held, disclaimers generally will not serve to dispel confusion resulting from the use of the same or similar marks. Buckspan v. Hudson's Bay Co., 22 F.2d 721 (5th Cir. 1927), cert. denied, 276 U.S. 628 (1928) ("Independent"); Phillips v. The Governor & Co., etc., 79 F.2d 971 (9th Cir. 1935) ("Not Connected With the Hudson Bay Company of Canada"); Esso, Inc. v. Standard Oil Co., 98 F.2d 1, 7 (8th Cir. 1938) ("Not Connected With Standard Oil Company (Indiana)"); R. H. Macy & Co. v. Colorado Clothing Mfg. Co., 68 F.2d 690 (10th Cir. 1934) ("Not connected with R. H. Macy & Co. of New York"); Volkswagenwerk A.G. v. Karadizian, 170 U.S.P.Q. 565 (C.D. Calif. 1971) ("Used cars only--Not a franchised Volkswagen dealer"); Volkswagenwerk A.G. v. Brewer, 170 U.S.P.Q. 560 (D. Ariz. 1971) ("Independent Garage Owners Association").

The district court was also completely justified in enjoining defendants from using sets in which the word "Lampoon" is spelled in block or moveable letters. As the court pointed out, the sets which defendants want to use are not only gargantuan in dimension, but would be displayed throughout the entire show in such a manner as to make the word not only the title but the very heart and body of the show.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Of Counsel,
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Respectfully submitted,
BOTEIN, HAYS, SKLAR & HERZBERG
Attorneys for Plaintiff

Dated: April 19, 1974

APPENDIX

COMPARISON OF SUBJECTS REFERRED TO IN SCHLATTER PRESENTATION WITH SUBJECTS HERETOFORE SATIRIZED BY NATIONAL LAMPOON MAGAZINE

- I. Scope of subject matter, referred to on page 9*, paragraph 5 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
Happenings in History and Today	Riders of the Black Hand (February 1972)
	Postwar Issue (September 1973)
	Special "IF" Section (May 1971)
	Colonel Teddy Jingo's Sketch (July 1972)
	Moon Mission (July 1973)
	Big Blessings Bulletin (June 1971)

- II. Subjects referred to on page 14, paragraph 4 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
Trivia	Mediocrity Supplement (July 1970)
	Boredom Issue (September 1972)
	Great Disappointments (April 1972)
	More to Come (September 1972)

* As the presentation (E-17) is incompletely numbered, page numbers refer to pages counted from and including the cover.

<u>Subject</u>	<u>National Lampoon Articles</u>
Non-Existent Causes	Lt. Calley's Kill the Children Federation (August 1971)
	Americans United to Beat the Dutch (April 1973)
TV Shows	All in de Famby (April 1973)
	Amos 'n' Andy Meet the Honeymooners (April 1972)
	More to Come (September 1972)
	6 Sure Fire Costumes Guaranteed to get you on "Let's Make a Deal" (December 1970)
	Cultural Television (March 1971)
	125th Street (October 1971)
Commercials	Nixon (July 1973)
	Crossing the Rubicam (May 1970)
Nostalgia	Nostalgia Issue (November 1970)
	Postwar Issue (September 1973)
	Modern Times (July 1973)
Holidays	Wide World of Meat (September 1972)
	Escape Issue (March 1972)

<u>Subject</u>	<u>National Lampoon Articles</u>
Fashions	Bizarre Magazine (June 1970)
	Cosmopolitan (January 1971)
	Guerre (September 1973)
	Manskin Is ... As Manskin Does (May 1972)
Events	News on the March (various issues)
People	Mrs. Agnew's Diary (various issues)
	Horrorscope (various issues)
	Letters Column (various issues)
	More to Come (September 1972)
	White House Romance (April 1970)
	An Interview with Howard Hughes (May 1970)
Inventions	Modern Times (July 1973)
	Inventions that Never Made It (December 1972)
	Father of the Trans- istor Radio (July 1973)
	The Undiscovered Notebock of Leonardo Da Vinci (March 1971)

SubjectNational Lampoon
Articles

Historical People
and Events

Tales of the South
(August 1972)

Johnson Remembers
(May 1971)

This is your Life ...
Francis Gary Powers
(December 1971)

Non-Existent Issues

Filial Politics - A
Kids' Lib Manifesto
(September 1971)

Techno - Tactics
(July 1973)

Wild Characters

Foto Funnies
(various issues)

III. Subjects referred to on page 27, paragraph 3 of Schlatter presentation:

SubjectNational Lampoon
Articles

Crazy Quiz

Catch It and You Keep It
(Radio Dinner album)

Land O'Million
(Radio Hour promotional
record)

IV. Subjects referred to on page 27, paragraph 4 of Schlatter presentation:

SubjectNational Lampoon
Articles

Salutes

Mens Issue
(May 1972)

Derby Dames on Parade
(April 1971)

Peut-etre
(October 1973)

Important Notice to Readers
(October 1973)

V. Subjects referred to on page 28, paragraph 1 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
Musical Moments	Lemmings, Act II
	Lemmings album
	Radio Hour (promotional record)
	Lennon parody (Radio Dinner album)

VI. Subjects referred to on page 29, paragraphs 2 and 4 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
Unusual News Events	News on the March (various issues)
	True Facts (various issues)

VII. Subjects referred to on page 30, paragraph 3 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
TV Shows under Different Circumstances	See TV Shows, <u>supra</u> .

VIII. Subjects referred to on page 32, paragraph 6 of Schlatter presentation:

<u>Subject</u>	<u>National Lampoon Articles</u>
Women's Lib	Women's Issue (January 1971)
	Men's Issue (May 1972)

<u>Subject</u>	<u>National Lampoon Articles</u>
Watergate	News on the March (various issues)
	Nixon (July 1973)
	G. Gordon Liddy, Agent of C.R.E.E.P. (October 1973)
	The Wonderful World of Watergate (October 1973)
Sports	Sports Issue (November 1973)
	Vintage Auto Demo Derby (November 1972)
	Computer Fight of the Century (August 1971)
Detroit Solutions	'58 Bulgemobiles (April 1972)
	Techno - Tactics (July 1973)
New Religions	Santology (December 1970)
	Strange Beliefs Issue (August 1973)
	Religion for Fun and Prophet Issue (June 1971)
History	See Historical People and Events, <u>supra</u> .
Education	Back-to-school Issue (October 1971)
	Stupid Aptitude Test (March 1974)
	Southern Indiana Methodist College Catalogue (November 1973)

<u>Subject</u>	<u>National Lampoon Articles</u>
Electric Car	Modern Times (July 1973) Clean Energy (June 1970)
Laundromats	----
Pets	Pethouse (January 1974) Ill, But Still Smart (January 1974)
Wall Street	The Gall Street Journal (May 1970) The CosNosCo Annual Report (May 1970) True Finance Magazine (May 1970)
Indians	American Indian: Noble Savage or Renaissance Man? (January 1972)
The Royal Wedding	News on the Mince, National Lampoon (February 1974)
Other Royal Things	The Coronation of King Dick (August 1972)
Our Leaders	The Secret of San Clemente (August 1970) Would you Buy a Used War from this Man? (August 1971) Nixon (July 1973) Mrs. Agnew's Diary (various issues) News on the March (various issues)

<u>Subject</u>	<u>National Lamnoon Articles</u>
Our Followers	The President's Commission on What's What (October 1970)
	The Great Roob Revolution (July 1970)
	Mediocrity Supplement (July 1970)
The Economy	The Gall Street Journal (May 1970)
New Toys	Amtrak Model Train Catalogue (October 1973)
	Fredrick's of Toyland (November 1972)
Pizza	----
Bill Macy	----
Pollution	Blight Issue (June 1970)
	Techno - Tactics (July 1973)
	Non-Polluting Power Sources (July 1973)
Population Explosion	This is the Way the World Ends (August 1970)
Planned Obsolescence	'58 Bulgemobiles (April 1972)
Planned Parenthood	The Palma Sutra (February 1973)
Health Foods	The Last, Really, No Shit, Really, the Last Supplement to the Whole Earth Catalogue (January 1972)

<u>Subject</u>	<u>National Lampoon Articles</u>
Diets	Summer of '44 (January 1972)
Day Care Centers	----
The Supreme Court	Nixon's Dream Supreme Court (July 1970)
New Math	Stupid Aptitude Test (March 1974)
Swingers	Piddle (February 1973)
	The Way to Become the Masculine He-Man (July 1972)
	The Censorless Woman (January 1971)
	How to Score with Chicks (May 1972)
	How to Make It with Men (May 1972)
Welfare	Welfare Monopoly (August 1971)
	Up With Negroes (May 1970)
	The Poor and The Super-Poor (May 1970)
Vacations	Escape Issue (March 1972)
	How I Spent My Summer (December 1973)
Women's Wear Daily	----

<u>Subject</u>	<u>National Lampoon Articles</u>
Campaign Funding	News on the March (various issues)
4 Day Work Week	----
TV in General	See TV Shows and Commercials, <u>supra</u> .
Co-Ed Dorms	----
The Pipeline	Techno - Tactics (July 1973) Alaska Pipeliner's Official Souvenir Program (November 1973)
Ralph Nader	The Last Recall (February 1972) Nader Report on Consumers (August 1971)
Sonny & Cher	----
Surveillance	News on the March (various issues) G. Gordon Liddy, Agent of C.R.E.E.P. (October 1973)
ITT	News on the March (various issues)
Wiretapping	News on the March (various issues)
TV News	Cultural Television (March 1971)
Resorts	Bland Hotel (September 1972)

<u>Subject</u>	<u>National Lampoon Articles</u>
Advertising	Your Ad Here (November 1972)
Conformity	The Great Roob Revolution (July 1970) Mediocrity Supplement (July 1970)
Inventors	See Inventions, <u>supra</u> .
Hair	----
Law and Order	News on the March (various issues) Nixon's Dream Supreme Court (July 1970) 8 Days that Shook Wook, Iowa (October 1970) The Love Song of J. Edgar Hoover (August 1972) Law of the Jungle (January 1974) Special Message to Chiefs of Police and Heads of Law Enforcement Agencies from the Attorney General of the United States, the Hon. Richard Kleindienst (June 1970)
Nostalgia	See Nostalgia, <u>supra</u>
The Work Ethic	----
TV Soap Operas	Il Detergenta (July 1970) As the Monk Burns (August 1971)

SubjectNational Lampoon
Articles

Campus Life

Right On! The Campus
War Game
(October 1971)School of Hard Sell
(October 1971)The Squealer
(October 1971)

Off-Shore Drilling

Sludge Magazine
(June 1970)Lady Firemen or
Fire Persons

Volunteer Army

Guerre
(September 1973)

COMPARISON OF SUBJECTS REFERRED TO IN
SCHLATTER PRESENTATION WITH SUBJECTS
HERETOFORE SATIRIZED IN NATIONAL LAMPOON RADIO HOUR

13

Scope of subject matter, referred to on page 14, paragraph 4 of Schlatter presentation:

"biting exposes of trivia..."

MR. CHATTERBOX, SHOWS 11, 12, 14, 16

"come out in favor of causes
that don't exist..."

THE LONG AND THE SHORTAGE OF IT, SHOW 4;
THE HUNTER SHORTAGE, SHOW 8; MRS.
FINCHALL INTERVIEW (EATING VEGAN
TABLES), SHOW 16; BUTTER IN TAXI-
CABS, SHOW 2; HUMOR RIGHTS, SHOW 15

"Lampoon TV shows..."

LAND A MILLION, SHOW 2; CATCH IT
AND YOU KEEP IT, SHOW 4; CAPOTE
INTERVIEW AT SAN QUENTIN, SHOW 2;
I'VE GOT AN INTERESTING PROBLEM,
SHOW 5; INFRACTION DAY, SHOW 7,
INCLUDING:

THE FBI; MISSION IMPEACHABLE;
FOOTBALL GAME COVERAGE: "LIVE
COVERAGE BY AN ANNOUNCER TEAM";
SENATE STREET; THE CONSTITUTION
GAME; NEARLY WATERGATE HEARINGS

"...commercials..."

REMEMBER THOSE FABULOUS, SHOW 3;
REMEMBER THOSE FABULOUS (II), SHOW 2;
NAGGING HEADACHE, SHOW 3; PATRICIA
REAL (MACGILL HOUSE), SHOW 5; EL
ALLENIE (COGNACIAN COFFEE), SHOW 5;
MR. WHIPPLE (CHARMIN), SHOW 5;
CONSULER PROTECTION, SHOW 5; MRS.
HUNT THE LADY PLUMMER, NIXON THORAZINE
(GERITOL), ZIEGLER CAVITIES (CREST),
SHOW 7; "POLEST" PSA SPOT, SHOW 8;
MONOLITHIC OIL CO., SHOW 9; MONO-
LITHIC OIL CO., (II), SHOW 12;
CATHERINE IS TROP PERFUME (DE NEUVE -
CHANEL), SHOW 9;

"...nostalgia..."

MEGAPHONE NEWS, SHOW 1; MEGAPHONE NEWS,
(II), SHOW 9; KING CREOSOTE, SHOW 3;
40s NOSTALGIA, SHOW 3; BUTTER IN
TAXICABS, SHOW 2

"...holidays..."

CHRISTMAS SHOW, SHOW 6

"...fashions..."

MR. CHATTERBOX, SHOWS 11, 12, 14, 16;
DISEASE FASHIONS, SHOW 12

"We lampoon famous historical
people and events, disclosing
heretofore secret inside infor-
mation about what really happened."

VERNON HUNTER INTERVIEW (COOLIDGE AS
SASSINATION), SHOW 8; GREAT MOMENTS IN
BLACK HISTORY, SHOW 14